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No. 84-919

In the Supreme Court of the United States

OCTOBER TERM, 1984

NEW YORK UNIVERSITY MEDICAL CENTER, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld the Board's finding that the distribution by employees of leaflets critical of the hospital and the union in connection with a campaign to elect delegates to the union convention was activity protected by Section 7 of the National Labor Relations Act.

2. Whether the court of appeals correctly upheld the Board's refusal to defer to an arbitrator's decision.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutory provisions involved 2

Statement 2

Argument 8

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Borman's, Inc. v. *NLRB*, 676 F.2d 1138 9

Cafeteria Employees Union, Local 302 v. *Angelos*, 320 U.S. 293 10

Eastex, Inc. v. *NLRB*, 437 U.S. 556 8

Fun Striders, Inc. v. *NLRB*, 686 F.2d 659, denying enforcement, 250 N.L.R.B. 520 9

International Harvester Co., 138 N.L.R.B. 923, aff'd *sub nom. Ramsey* v. *NLRB*, 327 F.2d 784, cert. denied, 377 U.S. 10003 11

Linn v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 10

National Association of Letter Carriers v. *Austin*, 418 U.S. 264 10

NLRB v. *Local Union No. 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 ..... 4, 7, 10, 12

Page

Cases—Continued:

NLRB v. *Pincus Brothers, Inc.*, 620 F.2d 367 ..... 11, 12

NLRB v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983) 5, 8

NLRB v. *Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union, Local 705*, 603 F.2d 505, cert. denied, 450 U.S. 1030 10

Olin Corp., 268 N.L.R.B. No. 86 (Jan. 19, 1984) 11

Southwestern Bell Telephone Co., 200 N.L.R.B. 667 9

Spielberg Manufacturing Co., 112 N.L.R.B. 1080 ..... 5, 11

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 ..... 9, 12

Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083, enforced, 662 F.2d 899, cert. denied, 455 U.S. 989 ..... 5, 7, 8, 12

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* :

§ 7, 29 U.S.C. 157 ..... 2, 6, 8, 9, 10

§ 8(a), 29 U.S.C. 158(a) 2

§ 8(a)(1), 29 U.S.C. 158(a)(1) 4, 6, 8

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OPINIONS BELOW

The order of the court of appeals on remand (Pet. App. 1aa-2aa) is unreported. The original opinion of the court of appeals (Pet. App. 1a-26a) is reported at 702 F.2d 284. The decision and order of the National Labor Relations Board (Pet. App. 28a-31a) and the decision of the administrative law judge (Pet. App. 32a-44a) are reported at 261 N.L.R.B. 822.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1984. The petition for a writ of certiorari was filed on December 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title * * *,

STATEMENT

1. Petitioner New York University Medical Center provides health care services in New York City (Pet. App. 33a). In September 1979, the Union[1] held elections at the Center to choose delegates to the national convention of the Union's parent organization. A group of dissident union members, including respondent employees Faustino Vargas and Leigh Benin, who also belonged to a political organization called the Committee Against Racism (CAR), ran for delegate positions against another slate of candidates that included the incumbent officers of the Union (*id.* at 34a).

On September 21, 24 and 25, employee Benin, and on one occasion employee Vargas, distributed leaflets to employees encouraging them to support the dissident slate of

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[1]District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO.

candidates in the union election. One of the leaflets addressed issues of concern to employees, including loss of jobs, inflation and alleged racial segregation within the Union. This leaflet also contained accusations that petitioner used its security guards as a "fascist gestapo" to conduct discriminatory searches of black and Hispanic workers (Pet. App. 3a-4a, 34a-35a). On September 28, petitioner issued written disciplinary warnings to Benin and Vargas for their distribution of the leaflets. The warning letters stated that any repetition of such conduct would result in "appropriate disciplinary action, including suspension or discharge" (*id.* at 35a).

In early October, Benin, Vargas and employee Laszlo Berkovits took part in the preparation and distribution of another leaflet, which discussed the results of the recent balloting for convention delegates, stated that Benin and Vargas had received written warnings for their distribution of a previous leaflet, and renewed the allegation that "the N.Y.U. management is using the security guards for fascist gestapo tactics to intimidate black and Spanish workers" (Pet. App. 4a-5a, 35a). On October 5, Benin was notified by petitioner that he was being suspended from work without pay because of his participation in the distribution of this leaflet (*id.* at 35a).

On October 8, Benin, Vargas and several other individuals picketed the home of petitioner's assistant administrator to protest Benin's suspension (Pet. App. 35a). Vargas and Benin did not go onto the assistant administrator's property at any time during the picketing (*ibid.*). On October 11, petitioner discharged Benin and suspended Vargas. Petitioner informed Benin and Vargas in writing that this disciplinary action was based in part on their participation in the picketing of the assistant administrator's home and that the employees' "recent activity in distributing leaflets * * * was also considered in reaching the decision" to discipline them

(*id.* at 5a-6a). Petitioner also issued a written warning to employee Berkovits on October 11 for his involvement in the distribution of the most recent leaflet (*id.* at 36a).

Pursuant to the collective bargaining agreement, Benin sought arbitration, and the arbitrator upheld the disciplinary actions as justified (Pet. App. 39a-40a). The arbitrator concluded that the language in the leaflets was "inflammatory, irresponsible, and hence unprotected under the Act" (Pet. App. 6a). The Board's General Counsel, however, subsequently filed a complaint alleging that petitioner's disciplinary measures violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1).

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner had violated Section 8(a)(1) of the Act by issuing disciplinary warnings to Benin, Vargas and Berkovits, by suspending Benin and Vargas, and by discharging Benin, because they were engaged in the protected activity of distributing leaflets concerning the intra-union election campaign (Pet. App. 32a-44a). Rejecting petitioner's contention that the nature of the language used in the leaflets caused the leaflet distribution to lose its otherwise protected status under the Act, the Board concluded that the language used was not so inflammatory or disruptive as to threaten hospital discipline (*id.* at 36a-37a). In addition, the Board rejected petitioner's contention that the leaflets reflected unprotected disloyalty by disparaging petitioner's product or services (see *NLRB* v. *Local Union No. 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953)). The Board also concluded that the allegations in the leaflets concerning searches of petitioner's employees were not made with

reckless disregard for the truth so as to cause the leaflets to lose the protection of the Act. Pet. App. 37a.[2]

In determining that the distribution of the leaflets was protected activity, the Board declined to defer to the arbitrator's decision upholding the disciplining of employee Benin. The Board stated that "[i]nasmuch as the Arbitrator found such language to be unprotected, his decision is clearly repugnant to the purposes and policies of the Act" under the Board's standards governing deferral set forth in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955). Pet. App. 40a.[3]

Finally, in concluding that the discharge of Benin and the suspension of Vargas were unlawful, the Board applied its *Wright Line* allocation of the burden of persuasion applicable to determining the lawfulness of discipline in dual-motive cases.[4] The Board found that the General Counsel had sustained his burden of establishing that the employees' protected activity — distributing leaflets — was a motivating factor in the discharge of Benin and the suspension of

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[2]The Board noted that Benin and Vargas had received reports that petitioner's guards were searching black and Hispanic employees, which served as the basis for the statements in the leaflets (Pet. App. 37a).

[3]In addition, the Board noted that neither Vargas nor Berkovits had agreed to be bound by the results of the arbitration and therefore that deferral was inappropriate as to those two employees in any event (Pet. App. 40a).

[4]*Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Under the Board's allocation of the burden of persuasion in *Wright Line*, where an employer's opposition to protected union activity is shown to be a motivating factor in its decision to take disciplinary action, that action will be found to constitute an unfair labor practice unless the employer demonstrates that the discipline would have been imposed even in the absence of the unlawful motive. See *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983), slip op. 7-10.

Vargas (Pet. App. 38a). The Board further found that petitioner had failed to rebut the General Counsel's showing by establishing that it would have discharged Benin and suspended Vargas if they had engaged only in the arguably unprotected picketing of the assistant administrator's home (*id.* at 39a). The Board relied on the fact that dual reasons were stated in the disciplinary papers given to the employees, and on petitioner's testimony that it used a progressive disciplinary system under which the picketing alone would not have justified the sanctions of discharge and suspension (*id.* at 38a-39a). The Board therefore found it unnecessary to reach the issue whether the employees' picketing activity was protected under the Act (*id.* at 38a). The Board ordered that Benin be reinstated with back pay, that Benin and Vargas be reimbursed for wages lost during their periods of suspension, and that the disciplinary warnings issued to Benin, Vargas and Berkovits be expunged from petitioner's personnel files (*id.* at 40a-44a).

3. a. The court of appeals agreed with the Board in part, but remanded for further proceedings (Pet. App. 1a-26a). The court sustained the Board's findings that the employees' leaflet distribution activity was protected by Section 7 of the Act, and that petitioner's suspension of Benin and issuance of warning letters to Benin, Vargas and Berkovits for the distribution of the leaflets violated Section 8(a)(1). In particular, the court agreed with the Board that the leaflets "taken as a whole" were not so inflammatory as to jeopardize hospital discipline (Pet. App. 9a-10a). The court stated that "the Center has not produced any evidence that it had a reasonable expectation that misconduct would ensue" (*id.* at 10a). The court rejected petitioner's contention that references in the leaflets to "beat[ing] up the segregation Klan" and the statement that "we mean business" exhorted employees to violence. The court found that, in the context of the intra-union campaign, the leaflets were merely

intended to attract voters to the dissident candidates, and that "the leaflets employ rhetoric unexceptional for a splinter political group." *Ibid.* Moreover, the court noted that there had been no history of violence or disruption at the Center and "no showing of incipient labor-management strife" (*id.* at 11a).

In addition, the court rejected petitioner's claim that the allegations concerning searches of minority employees by petitioner's security guards were made with reckless disregard for the truth so as to lose the protection of the Act. Noting that "there is no evidence that [the respondent employees] distorted the reports they received from fellow employees" concerning the searches, the court concluded that "[n]o material, deliberate misstatements were made" and that the "charges merely manifested the rhetoric characteristic of other parts of the leaflets." Pet. App. 11a-12a (footnote omitted).

The court also rejected petitioner's claim that the distribution of the leaflets amounted to unprotected "disloyalty" under the Court's decision in *Jefferson Standard.* The court noted that the leaflets were directed at fellow employees, related to upcoming union elections, and made no comment about the quality of petitioner's medical services. Accordingly, the court concluded that they did not constitute public disparagement of the employer's product under *Jefferson Standard.* Pet. App. 13a. The court also held that the Board's refusal to defer to the arbitral decision finding the conduct unprotected was a reasonable exercise of the Board's discretion not to defer to decisions that it finds repugnant to the purposes and policies of the Act (Pet. App. 7a).

b. Because the court disagreed with the Board's *Wright Line* allocation of the burden of persuasion in mixed motive cases, however, the court ordered that the case be remanded to the Board for reconsideration of the conclusion that the

discharge of Benin and suspension of Vargas violated Section 8(a)(1) (Pet. App. 13a-26a). Subsequent to the court's decision, this Court approved the Board's *Wright Line* approach in *NLRB* v. *Transportation Management Corp.*, No. 82-168 (June 15, 1983). On October 3, 1983, the Court granted the Board's petition for a writ of certiorari in this case (No. 82-1705) and remanded the case to the court of appeals for further consideration in light of *Transportation Management* (Pet. App. 3aa). On September 5, 1984, the court of appeals entered a judgment enforcing the Board's order in full (*id.* at 1aa-2aa).

ARGUMENT

Petitioner contends (Pet. 28-43, 47-52) that the court below erred by upholding the Board's conclusions that the leaflet distribution was protected union activity and that it should not defer to an arbitral decision finding the conduct unprotected.[5] Both of these largely factbound issues were correctly decided, and there is no reason for review by this Court.

1. It is well settled that employee distribution of leaflets on union matters does not lose the protection of Section 7 of the Act, 29 U.S.C. 157, unless the material is "inflammatory to the point of threatening disorder or other interruption of the normal functioning of the business * * *." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 573 n.22 (1978). The Board, upheld by the court below, reasonably applied that standard in concluding that the leaflet distribution here was protected. As the court of appeals explained (Pet. App. 10a-11a), in the context of the intra-union campaign in connection with which they were distributed, the leaflets were designed only to attract voters to the dissident groups and not to incite

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[5]Petitioner did not cross-petition on these issues when this case was previously before the Court.

disorder against the employer. The language they used is not unusual for literature from such dissident splinter groups. Given the lack of a history of discord or incipient strife between employees and management at the Center, the court correctly concluded, petitioner had no "reasonable expectation that misconduct would ensue" (*id.* at 10a). Petitioner's contention that the leaflet distribution was unprotected by Section 7 merely challenges the application of settled principles to the facts of this particular case — an issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951).

The cases relied on by petitioner to establish that the leaflets here should have been held unprotected because they threatened plant discipline (Pet. 28-34) are inapposite. In *Fun Striders, Inc.* v. *NLRB,* 686 F.2d 659 (9th Cir. 1981), denying enforcement, 250 N.L.R.B. 520 (1980), members of an outside political party who did not work in the plant prepared a leaflet urging "armed revolution" against the "bosses" and circulated it among employees engaged in a strike and picketing against their employer (see 250 N.L.R.B. at 523). The court concluded that under those circumstances the leaflets were inflammatory and that the employer could "reasonably believe[] that this advocacy threatened to inject violent confrontation into the plant" (686 F.2d at 662). In *Borman's, Inc.* v. *NLRB,* 676 F.2d 1138 (6th Cir. 1982), employees protesting a grievance against the employer wore shirts stating "I'm tired of bustin' my ass." As the court below noted (Pet. App. 11a), the message in *Borman,* unlike the leaflets here directed at fellow employees, was directed at the employer and posed a continuing challenge to its authority, thereby creating an ongoing potential for disruption of plant operations. The same was true of the message emblazoned on shirts in *Southwestern Bell Telephone Co.,* 200 N.L.R.B. 667 (1972).

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Petitioner further contends (Pet. 35-38) that the fact that the leaflets used such scurrilous terms as "fascist" and "gestapo" took the leaflets outside the protection of Section 7. Petitioner offers no support for this contention, however, and it was convincingly rejected by the court of appeals (Pet. App. 9a-13a). The court's conclusion that the language in the leaflets was protected is supported by decisions of this Court giving wide latitude to the use of opprobrious language in labor disputes. See, *e.g., National Association of Letter Carriers* v. *Austin,* 418 U.S. 264, 283 (1974); *Cafeteria Employees Union, Local 302* v. *Angelos,* 320 U.S. 293, 295 (1943); *Linn* v. *United Plant Guard Workers, Local 114,* 383 U.S. 53, 58, 65 (1966).

By the same token, the court of appeals correctly rejected petitioner's contention (Pet. 38-43) that the activity was unprotected because it was "disloyal" under *Jefferson Standard.* See Pet. App. 13a. The distribution of leaflets here was directed at fellow employees and made no disparaging comment about the employer's product or services that would constitute disloyalty. Petitioner errs in relying (Pet. 40) on *NLRB* v. *Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union, Local 705,* 630 F.2d 505 (7th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). There, the court upheld the discharge by a union of two of its employees with poor work records who, despite warnings from union officers, interrupted a union staff meeting and made personal use of the company CB radio in order to press their demands to the union. The court simply held that the nature and context of the employees' actions was such that they did not constitute protected activity under Section 7. The court did not discuss at all the possibility that the employees had been "disloyal" under *Jefferson Standard.*

2. Petitioner's contention (Pet. 47-52) that the Board should have deferred to the arbitrator's decision is similarly without merit. Petitioner does not dispute that the Board may decline to defer to an arbitration decision on the ground that it is repugnant to the purposes and policies of the Act where the decision is "palpably wrong." *International Harvester Co.*, 138 N.L.R.B. 923, 929 (1962), aff'd *sub nom. Ramsey* v. *NLRB*, 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003 (1964). Petitioner contends, however, that the decision below conflicts with *NLRB* v. *Pincus Brothers, Inc.*, 620 F.2d 367 (3d Cir. 1980), as to the proper approach for determining whether an arbitral decision is "palpably wrong" under the Act. Specifically, petitioner contends (Pet. 48) that *Pincus Brothers* requires the Board to defer whenever an arbitration decision is susceptible of an interpretation arguably permissible under the Act, whereas the court below held that "the Board only needs to defer when it agrees with the arbitrator's conclusions" (Pet. 49). That contention does not accurately reflect the decision below and certainly does not warrant this Court's review in the context of this case.

First, as both the Board and the court noted (Pet. App. 7a n.4, 40a), there was no arbitration decision with respect to the conduct of employees Vargas and Berkovits; deferral as to them therefore was inappropriate under the settled principle, which petitioner does not dispute, that permits deferral only as to parties who agree to be bound by the arbitrator's decision. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955). Second, the Board in *Olin Corp.*, 268 N.L.R.B. No. 86 (Jan. 19, 1984), expressly approved and adopted the Third Circuit's approach in *Pincus Brothers* (see slip op. 8 n.11), holding that it will not find an arbitration decision to be repugnant "unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act" (*id.* at 5). Thus, whatever differences may have

existed before, the Board has made clear that there is no conflict in legal principle between its present approach to determining whether deferral to an arbitral decision is appropriate and the court's approach in *Pincus Brothers.* And, of course, the court below expressed no disagreement with the standard set forth in *Pincus Brothers,* and there is no reason to suppose that it would not apply the same standard as both the Board and the Third Circuit.

There is no inconsistency in the fact that deferral was required in *Pincus Brothers,* but not required here. The court below concluded (Pet. App. 7a) that the arbitrator's decision in this case was not reconcilable with the policies of the Act, noting that the arbitrator "did not consider the rhetorical nature of the language used" in the special context of labor disputes, where the use of such language is given wide latitude. In *Pincus Brothers,* on the other hand, the court concluded that the arbitrator's decision that the language employed in the leaflets there was unprotected was at least arguably correct under the Act. The court advanced several theories in support of that result, such as the ground that the leaflets were "disloyal" under *Jefferson Standard.* Here, by contrast, the court rejected as untenable all grounds for finding the distribution of the leaflets to be unprotected. Thus, the difference in result in the two cases can be attributed to the difference in the nature and factual basis of the arbitrators' decisions, rather than to any asserted variation in the standard for deferral.[6]

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[6]Petitioner's additional contention (Pet. 43-47) that there is no substantial evidence supporting the Board's *Wright Line* determinations that the protected leaflet activity was a motivating factor in the decision to discharge Benin and suspend Vargas, and that petitioner failed to show that it would have imposed the same discipline in the absence of the protected conduct, also does not warrant the Court's review. See *Universal Camera Corp.* v. *NLRB, supra.* In any event, as the facts set forth above demonstrate (see pages 2-4, *supra*), there is ample support

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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in the record for the Board's conclusion. Contrary to petitioner's suggestion (Pet. 43-47), the Board did not hold that the picketing of the assistant administrator's home was conduct protected by the Act. It simply held that, in this "mixed motive" case, petitioner had failed to show that it would have taken the same disciplinary action if it had focused solely on the picketing and not also improperly considered the protected activity of distributing leaflets.

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